

LOL-HECO-IR-60

Ref: Expert Qualifications of HECO Thomas L. Harrington, re: "To supplement the capabilities of EDM's staff, EDM brought three subcontractors onto its Project Team. The subcontractors are ... Mr. Thomas L. Harrington and Mr. Louis Benedict of TLH Management Services Inc." (T-5, page 5, lines 10-13)

Question(s):

- a. In which subject matter fields does HECO plan to have the witness be qualified as an expert witness?
- b. In which subject matter fields does HECO plan to have the witness testify as a lay witness?
- c. For each expert witness, in their area of expertise, please provide answers to items (c)1-6, as listed below. Wherever possible, please provide the answer either in electronic format or by providing a web address where the document(s) can be down-loaded.
 1. All articles, books, chapters, or other documents written in whole or in part by the witness. Please provide the date of publication or release, the agency it was submitted to, the docket and/or file number that contains the document. Please provide electronic copies of all documents if they exist. Please provide the location of hard copies (source, cost, docket number, file number, or other identification).
 2. All courses taken, degrees given, courses/classes taught by the witness. Please provide electronic copies of all documents if they exist. Please provide the location of hard copies (source, cost, docket number, file number, or other identification).
 3. All presentations, testimonies, talks made and exhibits submitted by the witness to regulatory agencies. Please provide electronic copies of all documents if they exist. Please provide the location of hard copies (source, cost, docket number, file number, or other identification).
 4. All projects overseen by the witness. Please include the dates of participation and any identifying characteristics of the project necessary to track down information about it. Please provide electronic copies of all documents if they exist. Please provide the location of hard copies (source, cost, docket number, file number, or other identification).
 5. All correspondence between the witness and HECO with regard to their testimony. Please provide electronic copies of all documents if they exist. Please provide the location of hard copies (source, cost, docket number, file number, or other identification).
 6. All reports, draft or otherwise, submitted by the witness to the utility. Please provide electronic copies of all documents if they exist. Please provide the location of hard copies (source, cost, docket number, file number, or other identification).

HECO Response:

- a. In general, Mr. Harrington will testify as a witness on HECO's behalf in the area of utility construction, including schedule and construction impacts such as traffic and noise. The Hawaii Public Utilities Commission generally does not require that a witness be recognized as an "expert witness" in a particular area or subject. The Commission will give the appropriate consideration to a testimony based on its merit.
- b. See the response to subpart a.
- c.

- 1. HECO objects to the request, as unduly burdensome, onerous and overly broad to the extent that it requests "[a]ll articles, books, chapters, or other documents written in whole or in part by the witness." The request is unduly burdensome, onerous and overly broad, because the request for "[a]ll articles, books, chapters, or other documents written in whole or in part by the witness" could be construed to apply to documents written by the witness even if such documents are not related to the subject matter addressed by the witness. Without waiving any objections, please see the following response.

See the response to subpart c.6 for the reports (i.e., technical memorandums)

Mr. Harrington has prepared for the subject project.

- 2. None.
- 3. HECO objects to the request, as unduly burdensome, onerous and overly broad to the extent that it requests "[a]ll presentations, testimonies, talks made and exhibits submitted by the witness to regulatory agencies." The request is unduly burdensome, onerous and overly broad, because it could be construed to encompass numerous

materials. Without waiving any objections, please see the following response.

See HECO T-8 and exhibits, and HECO ST-8 and exhibits, for Mr. Harrington's testimonies in this proceeding. In addition, Mr. Harrington submitted written direct and surrebuttal testimony, and also testified on HECO's behalf, in the Board of Land and Natural Resource's contested case hearing for HECO's Conservation District Use Application (DLNR File No. OA-2801) for Waahila Ridge for the Kamoku-Pukele 138kV Transmission Line project, in which Life of the Land was a party. Mr. Harrington has also met with City Neighborhood Boards regarding the projects identified in HECO-800.

4. See HECO-800 for a list of utility related construction projects.
- 5.6 HECO objects to providing copies of "[a]ll correspondence between the witness and HECO with regard to their testimony" and "[a]ll reports, draft or otherwise, submitted by the witness to the utility". The request for "[a]ll correspondence between the witness and HECO with regard to their testimony" includes various e-mails and attachments to the e-mails. HECO objects to providing the requested correspondence, as these documents are privileged and confidential and should not be provided on public policy grounds. In the correspondence between HECO and the witness, the discussions are brief since HECO personnel and the witness understand the context of the subject matter and HECO believes that it is not cost effective to spend the time to generate elaborate discussion on the subject matter. If HECO is required to produce such correspondence between HECO and the witness, then the information would have to be generated in a fashion suitable for external publication, rather than in its present form

(which is suitable for HECO's discussions with the witness). This would be unduly burdensome and onerous, as well as counterproductive.

The correspondence between HECO and the witness are solely intended to be a tool to communicate information between HECO and the witness. The correspondence are an integral part of the decision making process in which thoughts are expressed, which may not be reflected in the written testimony. In addition, documents such as drafts of testimony, which are attached to e-mails, are a necessary step in the decision making process and can result in candid dialogue. Were these documents subject to review by others in a regulatory proceeding, their candid nature and, therefore, their value could diminish significantly in the future, and HECO's communications with its witnesses and decision-making process would be seriously hampered.

This information request basically requests unlimited access to HECO's correspondence with HECO's witness related to the testimony. This information request fails to balance the need for the information against HECO's need to manage. For example, the Federal Freedom of Information Act ("FFIA"), codified at 5 U.S.C. §552, and the Uniform Information Practices Act (Modified), codified at H.R.S. Ch. 92F, contain broad disclosure requirements based on the public's interest in open government. However, even such broad disclosure acts provide exceptions from the broad disclosure requirements that are intended to permit the efficient and effective functioning of government. It is common in such acts to protect from disclosure pre-decisional agency memoranda and notes, and/or government records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function. This is similar to the "deliberative process privilege" recognized by the

Pennsylvania Public Utility Commission with respect to its own internal staff reports.

See Pennsylvania Public Utility Commission v. West Penn Power Company, 73 PA PUC 122 (July 20, 1990), West Law Slip Op.

In addition, the request is overly broad or at least could be construed in that fashion, and HECO objects to the request on such grounds. The request is overly broad, because it applies to correspondence related to drafts of testimony being prepared for this proceeding, and questions or comments from HECO's attorneys related to the testimony. HECO objects to providing correspondence related to drafts of testimony on the grounds stated above, regardless of whether such correspondence relates or reflects privileged communications with attorneys or attorney-work product. To the extent the request asks for communications that may contain the mental impressions, conclusions, opinions, or legal theories of HECO's attorneys (e.g., some attachments to e-mails include the mental impressions and conclusions of HECO's attorneys on drafts of testimony), HECO further objects to such request on the grounds that it asks for documents that are protected by the attorney-client privilege and the attorney work-product doctrine.

HECO objects to the request for "drafts" of "[a]ll reports . . . submitted by the witness to the utility" on the grounds stated above regarding drafts of testimony.

HECO also objects to disclosure of such requested correspondence and draft reports even under a protective order. The value of the correspondence (including the attachments) with a witness and draft reports will be diminished if HECO is required to provide such documents, even if documents were provided pursuant to a protective order.

Without waiving these objections, HECO provides the following response.

See HECO-801, HECO-802, HECO-803, HECO-804, and HECO-ST-801 for the technical memorandums submitted by Mr. Harrington. An electronic copy of these technical memorandums, in PDF form, was provided to each party by letters dated April 7, 2004 and July 22, 2004.